Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978
No. 78-824

HAROLD BRAUER,

Petitioner,

vs.

SHEET METAL WORKERS PENSION PLAN OF SOUTHERN CALIFORNIA, ARIZONA AND NEVADA,

Respondents.

Opposition to Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Law Offices of ROBERT W. GILBERT,
A Law Corporation,
400 South Beverly Drive, Suite 305,
Beverly Hills, Calif. 90212,
(213) 552-1300,
ROBERT W. GILBERT,
Counsel for Respondents Sheet Metal Workers Pension Plan of Southern California, Arizona and Nevada.

JAMES B. GOODMAN,
KENNETH J. SACKMAN,
ROBERT W. GILBERT, a Law Corporation,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Opposition to Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Opinion Below.

The opinion of the Court of Appeal of the State of California, Second Appellate District is reported at 82 Cal.App.2d 150.

Jurisdiction.

Petition incorrectly invokes jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction may be appropriate under 28 U.S.C. § 1257(3).

Questions Presented.

The two questions presented in this case are as follows:

1) Whether under Section 302 of the Labor Management Relations Act, 1947 (29 U.S.C. § 186), a Fifty Percent (50%) shareholder of a corporation is

an "employer" rather than an "employee" and is thereby precluded from receiving benefits from a pension trust established under that Section.

2) Whether the determination by the Board of Trustees that a 50% stockholder is an employer and not an employee is arbitrary and capricious, or conversely, is that determination reasonable.

Statement of the Case.

A. Factual Background.

Petitioner is and has been a sheet metal worker since approximately 1948. From 1948 on Petitioner has also been a member of Sheet Metal Workers International Association Local 108. (C.T. p. 4.)[1] In 1951 Petitioner became a partner in Crenshaw Sheet Metal and Heating Company. (C.T. pp. 37-527). In 1958 the Pension Plan was adopted pursuant to a collective bargaining agreement and Section 302(c)(5), (29 U.S.C. § 186(c)(5)).

In 1958 Irving Rudley became the owner of 750 shares of stock in the corporation then known as Crenshaw Sheet Metal and Heating, Inc. (C.T. p. 323.) Apparently, Harold Brauer continued to work for Crenshaw Sheet Metal as a sheet metal worker from 1951 through at least 1965. On June 7, 1965, Brauer became the registered owner of 750 shares of stock which were issued to him at that time. (C.T. pp. 324, 131 and 527.) Brauer alleges, and it is not disputed by Respondents, that he continued to work for the corporation as a sheet metal worker, and it is similarly undisputed that contributions continued to be made on his behalf to the Pension Fund. (C.T. p. 474.)

[1]References to the Clerk's Transcript are abbreviated "C.T.".

By letter dated March 26, 1973, Respondent Pension Plan advised all employers including Harold Brauer that they could not accept contributions on behalf of any employers, in light of the statutory prohibition contained in the Taft-Hartley Act. That letter indicated that an "employer" was any person owning 50% or more of the stock of a corporation. (C.T. p. 588.)

Notwithstanding the letter of March 26, 1973, Plaintiff continued to make contributions on his own behalf into the fund and failed to notify the Trustees of his 50% ownership interest in Crenshaw Sheet Metal.

On July 11, 1973, Respondent Plan advised him in response to an inquiry by Plaintiff that he would be entitled to a $500.00 per month pension based upon 25 years of Pension Credit. At that time the Trustees had no knowledge of Brauer's ownership interest. Thereafter, after further investigation by the Plan, in a letter dated September 25, 1973, Respondent advised Petitioner that since he was, and had been, an employer he would be ineligible for a pension benefit. (C.T. p. 470.) On November 25, 1973 Defendant Plan tendered a refund to Petitioner of the contributions made on his behalf during the period of time that he was an owner of the business. (C.T. pp. 473-465.)

B. Procedural Background.

On June 21, 1974, the Petitioner brought the instant action in the Los Angeles Superior Court for declaratory relief, breach of contract and deceit. (C.T. p. 1.)

Subsequently, Petitioner filed a first amended complaint on October 28, 1974. (C.T. p. 45.) Said complaint set forth nine causes of action against the Pension

Plan, Local 108 and various Local Union officers for declaratory relief, breach of oral and written contracts and deceit.

Following all Respondents' answers to the first amended complaint, the matter was set for trial. After the opening of said trial and before any testimony was given, the court granted Respondents' motion for judgment on the pleadings. This ruling was based upon the fact that Petitioner admittedly had been a partner and then a 50% shareholder of stock in the corporation of Crenshaw Sheet Metal and Heating, Inc., and as a result thereof, under applicable Federal Law, Petitioner was an employer. The court ruled that Federal Law provides that a Taft-Hartley trust fund may only provide benefits for the "sole and exclusive benefit of employees," and since Petitioner is not an employee within the meaning of the National Labor Relations Act as amended, that, therefore, Petitioner was, as a matter of law, ineligible to participate in this pension fund.

On April 18, 1977, the court signed the judgment (C.T. p. 888), and on April 19, 1977, notice of entry of judgment was filed. Petitioner filed its notice of appeal on June 15, 1977, specifically appealing from the entire judgment on the pleadings entered on April 18, 1977. (C.T. p. 895.)

In his Petition to this Court, Petitioner has abandoned his claim against the union and the individuals and his various causes of action for breach of contract and deceit. He also appears to admit that he is not

entitled to Pension Credit for the period in which he was a partner in Crenshaw Sheet Metal, in that he admittedly was an employer during that period. Petitioner has limited his Petition to the propriety of the Trustees' determination that a 50% shareholder is an employer for purposes of Section 302 and therefore is ineligible for pension benefits from a Trust established pursuant to that Section.

REASONS FOR DENYING THE WRIT.

1. Section 302(c)(5) Prohibits an Employer From Participating in a Taft-Hartley Pension Plan.

Section 302 generally provides restrictions on payments and loans by employers or employer associations to labor organizations, officers or employees thereof, and employees of the employer subject to certain enumerated exceptions. That Section provides criminal penalties for violations.[2]

The exception applicable to pension plans is contained in subsection (c)(5) which provides that the provisions [criminal penalties] of the Section shall not be applicable

> "with respect to money or other thing of value paid to a trust fund established by such representative, *for the sole and exclusive benefit of the employees of such employer,* and their family and dependents . . . ."

That exception is subject to certain provisos such as the requirement that the money be held in trust and administered by "*employees and employers . . . equally represented in the administration of such fund*", that the provisions of the Trust be set forth on a detailed basis in writing, that procedures be established to break deadlocks between the employees and employers in the administration of the Trust, that annual audits be conducted, etc.

Petitioner does not dispute the fact that if he, indeed, is an employer, that he is not and cannot be eligible for Pension Credit or pension benefits based on the period in which he was a employer. The sole dispute

[2]The full text of Section 302 is set forth in the Appendix.

is over the Trustees' interpretation of the term "employer".

In seeking statutory guidance as to the intent of Congress to determine whether the Plaintiff is an employee or an employer for purposes of Section 302, we must note that Section 501 of the Act, 29 U.S.C. § 142, provides that the definition of employee for purposes of Section 302, shall be the same as the definition set forth in the National Labor Relations Act, at 29 U.S.C. § 152(3).

That Section provides:

> "The term employee shall include any employee, and shall not be limited to employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular or substantially equivalent employment, shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed by an employer subject to the Railway Act, as amended from time to time, or by any other person who is not an employer as herein defined."

In interpreting 29 U.S.C. § 152, the National Labor Relations Board has consistently held that the definition of the term "employee" excludes sole proprietors and partners. There is no dispute as to that fact in the instant matter.

Further, the National Labor Relations Board has ruled that a 50% shareholder is in substantially the equivalent position as an individual who is a partner or a sole proprietor of that business, and therefore, not an employee. Thus, even though the state laws, with respect to closely-held corporations, provide different rights and obligations for 50% shareholders of corporations than they would for a partnership or a sole proprietorship, *for purposes of collective bargaining,* the Board has recognized that a 50% shareholder stands in the same position vis-a-vis his employees and the collective bargaining relationship, as would a partner or sole proprietor.

Thus, the National Labor Relations Board, in the case of *Cerni Motor Sales, Incorporated and District 79, International Association of Machinists and Aerospace Workers,* 201 NLRB 133, found that a 50% shareholder would be deemed to be an employer. In that specific case, in fact, the child of the 50% shareholder was similarly excluded from the definition of "employee" inasmuch as the shareholder was deemed to be the employer for all purposes. In *Cerni Motors,* the Board was reviewing and reaffirming its decision in *Foam Rubber City No. 2 of Florida,* reported at 167 NLRB 623. (See also *Toyota Midtown,* 223 NLRB No. 106.)

Thus, it is clear that where an individual owns 50% or more of a closely-held corporation, that individual is an employer for purposes of the definition section of the National Labor Relations Act.

Thus, the United States Court of Appeals, for the Second Circuit, found in the lead case of *Moglia v. Geoghagen,* 403 F.2d 110 (2nd Cir. 1968) that payments to a trust fund may only be made where the

contributions are destined for "the sole and exclusive benefit of the employees of such employer."

In interpreting *Moglia,* courts have routinely found that an individual such as Petitioner herein, who is the employer of his employees, is not eligible to participate in such a plan. See e.g., *Thurber v. Western Conference of Teamsters Pension Plan,* 542 F.2d 1106; *Dohrer v. Wakemen,* 14 Wash.App. 157, 539 P.2d 91; *Melang v. IBEW Pacific Coast Pension Fund,* (W.D. Wash. 1976) 93 LRRM 2389; *Bargreen v. Western Conference of Teamsters Pension Trust,* (W.D. Wash. 1976) 91 LRRM 2803.

As the court stated in *Moglia*:

> "[o]nly employees and former employees of employers who are lawfully contributing to a union pension trust fund may qualify as beneficiaries of a Section 302 trust. *Rittenbury v. Lewis,* 238 F.Supp. 506 (E.D. Tenn. 1965); *Bolgar v. Lewis,* 238 F.Supp. 595 (W.D. Pa. 1960)."

As the court went on to explain:

> "The reason for the rigid structure of Section 302 is to ensure that employer contributions are only for a proper purpose and to ensure that the benefits from the established fund reach only the proper parties. *Schwartz v. Associated Musicians of Greater New York, Local 802,* 340 F.2d 228, 233-234 (2nd Cir. 1964). Any erosion of the strict requirements of this section could provide an unintended loophole for the unscrupulous, and could result in a diversion of funds away from the proper parties as had occurred before Section 302 was enacted. See *Arroyo v. United States,* 359 U.S. 419, 423-427; Cf. *Inter-*

national Longshoremen's Association v. Seatrains Lines, Inc., 403 F.2d 110, 116."

The only conceivable question left for this Court to determine is whether a 50% shareholder who, for purposes of the National Labor Relations Act, shall be treated as the employer of his employees must also be so treated for purposes of Section 302(c)(5) pension plans. While the answer to this question has never been specifically stated in any reported cases, Section 501 clearly states that courts are to follow the definitions of "employee" and "employer" as contained in the National Labor Relations Act.

Plaintiff attempts to argue, nevertheless, that the definitions contained in the National Labor Relations Act are not necessarily binding in Section 302 cases, notwithstanding Section 501. He bases his argument on the decision of this Court in *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass,* 404 U.S. 157. That case, however, as Plaintiff, himself, points out, does not involve the applicability of NLRA definitions, but involved the duties and responsibilities of a union in collective bargaining vis-a-vis its role in the joint management of a Section 302 trust fund. It is obvious that the fiduciary duties towards the beneficiaries involved in such management is different and distinct from the duties of the union involved in collective bargaining. (See *e.g., Toensing v. Brown,* 528 F.2d 69 (9th Cir. 1975); *Knoll v. Phoenix Steel,* 465 F.2d 1128 (3rd Cir. 1972)).

Plaintiff conveniently ignores another case decided by this Court which expressly accepts the mandate of Section 501(3) that the terms enumerated in that section (including that of the employer) shall have

the same meaning for purposes of the Labor Management Relations Act as they do for the National Labor Relations Act. *United States v. Ryan,* 350 U.S. 299, 301. Thus Plaintiff's argument has already been rejected by this Court.

Plaintiff's argument further ignores the recognition by Congress as expressed in the Labor Management Relations Act that employers and employees have very different interests not only in the collective bargaining process, but also in regards to the management of pension trust funds. The establishment of joint control over trust funds based upon equal representation between labor and management on the board of trustees is based upon that principle [See *Legislative History of the Labor Management Relations Act,* (United States Government Printing Office, 1948) pp. 458, 571 and 304 and *Moglia v. Geoghagen,* 267 F.Supp. 641, 647 (S.D.N.Y. 1967) aff'd 403 F.2d 110 (2nd Cir. 1968) cert. denied 394 U.S. 919 (1969).

It would be anomalous, indeed, if after providing restrictions on payments by employers to employees or their representatives that Congress would provide an interesting loophole by allowing the employers and the employees or their representatives to be *the same person.* The possibility of corruption and abuse which was to be prevented by the requirements of Section 302(c)(5), (*Alvares v. Erickson,* 514 F.2d 156, 164 (9th Cir. 1975) would obviously be increased under Plaintiff's novel theory of employers and employees. A 50% shareholder, obviously, is aligned in his interests with management and, in fact, as recognized by the National Labor Relations Board, *is management.* The theory that he can participate as an employee or as a representative of the employees, brings back the same

possibilities of abuse as existed prior to the passage of Section 302.

It is clear that the public policy as expressed by Congress in Section 302 militates against treating persons in such a clear management position as a half owner of a company, as an employee for purposes of Section 302.

2. The Determination by the Trustees That a 50% Shareholder Is an Employer, Is Reasonable and Not Arbitrary and Capricious.

Both the state and federal courts have developed a standard of review of decision and rules of the trustees of Section 302 trusts. Those rules and decisions will be reversed only if they are arbitrary and capricious. *Wilson v. Board of Trustees,* 564 F.2d 1299 (9th Cir. 1978); *Foley v. Devaney,* 528 F.2d 888 (3rd Cir. 1976); *Beam v. Masters, Mates & Pilots,* 511 F.2d 975 (2nd Cir. 1975); *Miniard v. Lewis,* 387 F.2d 864 (D.C. Cir. 1967); *French v. Construction Laborers Pension Trust,* 44 Cal.App.3d 479, 118 Cal. Rptr. 731 (1975).

Here the Trustees, in good faith, have determined that a 50% shareholder of a corporation is an employer and therefore ineligible for benefits under the Plan. It is undisputed that the determination was based on the concern over the requirements and policy behind Section 302, and that it was based upon the National Labor Relations Board's definition of "employer". In such circumstances, the Third Circuit has ruled in accord with the California Court that an amendment to the plan in the reasonable belief that it brought the plan in conformity with the Taft-Hartley Act is certainly not arbitrary and capricious. *Gomez v. Lewis,* 414 F.2d

1312 (3rd Cir. 1969). The California Court in this case adopted that view as an alternative rationale for their decision.

The case of *Reiherzer v. Shannon,* 581 F.2d 1266 (7th Cir. 1978) relied upon by Petitioner while superficially resembing this case, actually supports the application of the arbitrary and capricious standard and the reasonableness of the Trustees' determination here. In that case, it must be noted, the Trustees did not raise the issue of the legality of payments to an employer or the definition of the term "employer" in Section 302(c)(5).[8]

Rather the trustees in *Reiherzer* based their decision not on a percentage of stock owned or potential control exercised by the individuals but on declaration by the individual for tax purposes that he was self-employed. Thus while Reiherzer was a 90% stockholder and president, the trustees allowed him to participate in the trust until he made that declaration for tax purposes. The Seventh Circuit ruled that in those circumstances, where the degree of ownership and potential control remained the same throughout the period it was arbitrary and capricious for the trustees to change Reiherzer's status in the plan. In light of the trustees' failure to raise the Section 302 issue in that case, the result is certainly not surprising.

Here, however, the Trustees have looked precisely to the degree of ownership and potential control of the individual and have accepted the National Labor Relations Board standards as to the degree of such

[8]The case of *Sanchez v. Board of Trustees,* 359 So.2d 1279 (La.Supr.Ct. 1978) similarly failed to analyze the policy behind Section 302.

ownership that aligns an individual as management or as an employer. Lines must inevitably be drawn in a trust such as this, separating the eligible from the ineligible. *Roark v. Lewis,* 401 F.2d 425, 528-529 (D.C. Cir. 1968); *Wilson v. Board of Trustees, supra* at 1302. In such circumstances, it is clear that the Trustees' determination is reasonable and supported by a rational basis as found by the Court below, and therefore, perfectly lawful under the standards adopted under Section 302.

Conclusion.

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT W. GILBERT,
ROBERT W. GILBERT, a Law Corporation,
Attorneys for Respondents.

Of Counsel:
JAMES B. GOODMAN,
KENNETH J. SACKMAN.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of December, A.D. 1978.

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